BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF ESPN, INC.

ESPN, Inc., ("ESPN") hereby submits these Comments in response to the Further Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. ESPN currently operates two sports-oriented video programming services: ESPN, which was launched in September 1979 and now reaches over 67 million cable and other multichannel video distribution service subscribers (making it the number one cable programming network in terms of availability) and ESPN2, which was launched in October 1993 and now reaches over 30 million subscribers. As discussed below, ESPN believes that the Commission's proposal to revise its leased access rate-setting methodology will ultimately disserve the public interest by disrupting relationships between non-leased access programmers and cable operators and by frustrating consumer expectations.

DISCUSSION

The Notice proposes to replace the Commission's current "highest implicit fee" formula for setting leased access rates with an ostensibly cost-based approach. According to the Notice, the Commission has tentatively concluded that the current formula "overcompensates" the cable operator and that the proposed revision will better serve the statutory goals of assuring competition and diversity in the programming marketplace without requiring cable operators to subsidize leased access. Notice at para. 7. ESPN respectfully disagrees with this tentative conclusion. Not only is there no incompatibility between the statutory purpose of leased access and the current formula, but the effect of the Commission's revised methodology will be to subsidize the carriage of leased access programming for which there is no demonstrated marketplace demand.

In analyzing the Commission's proposed revision of the leased access rate formula, the necessary starting point is Congress' intent in imposing leased access obligations on cable operators. Initially, Congress adopted the leased access requirements contained in Section 612 of the 1984 Cable Act to address concerns that cable operators could use their editorial control to frustrate consumer demand for diverse programming. H.R. Rep. No. 934, 98th Cong., 2nd Sess. 48 (1984). Later, as part of the 1992 Cable Act, Congress indicated that the availability of leased access capacity should also serve as a "safety valve" in the event that cable operators sought to frustrate the delivery of market viable programming for competitive reasons. S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1992). At no time, however, did Congress ever suggest that leased access was intended to provide an outlet for programming that could not otherwise generate sufficient marketplace demand to warrant carriage.

In light of the foregoing, it is clear that the Commission's goal in regulating leased access cannot and should not be to promote the use of leased access capacity as an end in and of itself; rather, it should be merely to ensure that the rates charged for leased access do not themselves become an insurmountable barrier to the distribution of market viable program services that have been denied carriage due to editorial or anticompetitive considerations. By establishing a rate that is unreasonably below the market value of cable channels, the Commission can do great harm to the underlying goals of Section 612. Mandating that leased access channels be available at an artificially low rate creates a subsidy for leased access programmers at the expense of those already acting as diverse sources of programming. Such a policy will help insure that programming of little value prevails over programming that consumers and cable operators demand; ultimately the large investments already made (or planned) by a number of programmers may simply prove inconsequential as a result of this policy.

In order to fully understand the nature of the subsidy built into the Commission's proposal (and why the current rate formula is not unreasonable), it is necessary to consider not only the costs incurred by the cable operator in carrying a leased access channel (including such costs as lost subscribership which are not incorporated into the Commission's approach), but also the enormous investments made by non-leased access programmers to attract and maintain widespread carriage. By focusing too narrowly on the payment of affiliate fees by the cable operator, the Commission has perhaps lost sight of the programmer's investment in the creation and marketing of programming for which there is actual (or at least anticipated) consumer demand.

For example, over the past seventeen years, ESPN has invested millions of dollars in programming, technology, image advertising, customer relations, and other marketing-related endeavors to "earn" and maintain carriage of its services on cable systems. The Commission's analysis ignores such investments which are aimed at creating a product that cable operators will want to carry and subscribers will be willing to purchase. Consequently, the Commission may fail to appreciate both the extent to which its current formula acts as a surrogate for these costs and the level of subsidy built into the proposed "cost" approach that allows leased access programmers to purchase distribution at pre-set rates without having to "invest" their way onto a cable system through the creation and marketing of desirable programming.[1]

Subsidizing the distribution of programmers that lack sufficient consumer attractiveness to earn carriage on a non-leased basis obviously is harmful to the cable operator. However, it will also be potentially devastating to other programmers and, ultimately, to investment in diverse quality programming and consumer choice. As the Commission's own studies have shown, various regulatory and technological developments (including increased channel capacity, the growth of MMDS and DBS, and the adoption of retransmission consent and regulation of carriage rules) have fueled enormous growth in the programming marketplace. In the face of this reality, the fears that led Congress to adopt leased access (i.e., the stifling of diversity and competition) seem distant indeed. While the

[1]In fact, in contrast to a leased access programmer, which will know exactly how much it will cost to "purchase" a subscriber, non-leased access programmers are likely to maximize their investment in marketing, programming and other operator- and viewer-beneficial endeavors to obtain and maintain carriage.

Commission cannot ignore its mandate to promulgate rules in this area, it must remain sensitive to marketplace realities and consumer demand. In fact, the Commission's new cost formula implicitly recognizes (albeit only in the full set-aside context) that relying on market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about leased access programming. See Notice at para. 10. However, given the likelihood that there will not be sufficient leased access demand in most instances to trigger market-based pricing, the Commission must be extra vigilant to avoid creating subsidies for programming with no demonstrated consumer demand.

History has shown that it takes surprisingly little intervention to upset a functioning competitive structure -- as was demonstrated by the Commission's initial "going forward" rules.[2] By subsidizing leased access programming, the Commission risks distorting competition among programmers for channel capacity and channel and tier position. Moreover, the Commission's proposal threatens to disrupt the partnership that exists between non-leased access programmers and cable operators. That partnership -- to which cable operators contribute their distribution facilities and programmers their programming and marketing resources -- creates incentives for cable operators and programmers to work together to maintain and improve the quality of the "neighborhood" (i.e., the basic or

---

[2]Under the initial "going forward" rules, adopted in February 1994, the amount by which regulated cable rates could be adjusted upon the addition of new channels decreased to *de minimis* levels as the number of channels carried increased. This approach was ultimately revised by the Commission because it did not create "a sufficient incentive for most operators to provide subscribers with additional channels from either unused or new capacity." See Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket Nos. 92-266, 93-215, 10 FCC Rcd 1226, 1229 (1994). See also "FCC Rules Attacked From Inside And Out," Broadcasting & Cable, May 30, 1994 at 45.

expanded basic tiers). If the attractiveness of that "neighborhood" to subscribers is diminished significantly by the loss of popular services at the expense of services that add no value (or, indeed, are viewed by subscribers as having a negative value), both the cable operator and the programmer will suffer. And, ultimately, the public loses as investment in attractive and diverse programming declines.

In short, ESPN strongly urges the Commission to abandon its proposal to modify the existing leased access fee structure. If, nonetheless, the Commission decides to move forward, it is essential that the Commission take steps to mitigate the impact of its new rules on existing and emerging program networks.

When Congress first imposed leased access obligations on the cable industry in 1984, it recognized that forcing cable operators to "bump" existing services to add leased access services would upset business relationships and consumer expectations. Consequently, Congress adopted a "grandfathering" provision that ensured that, in the pursuit of unused channel capacity, leased and non-leased programmers began their competition from the same starting line. It would be manifestly unfair for the Commission, twelve years later, to change the leased access rules without taking into account the fact that cable programmers have invested many millions of dollars to develop and market their services in the context of the existing leased access regulatory environment. In particular, we urge the Commission to consider the following proposals aimed at minimizing the disruption of such changes, particularly if established and emerging networks are subject to sudden and potentially devastating displacement by subsidized leased access programmers.

First, rather than requiring cable systems that have no vacant channels to drop existing services to make room for leased access channels, the Commission should allow cable operators to satisfy their leased channel obligations solely with unused capacity (i.e., channels opened up by the market-dictated deletion of an existing service or added as a result of a capacity upgrade).[3] Such an extension of the "grandfathering" approach adopted by Congress in 1984 clearly falls within the Commission's authority under Section 612(c)(4)(A)(ii) of the 1992 Act to establish reasonable terms and conditions for leased access use. Furthermore, it is essential in order to ensure that the effects of the Commission's revised "going forward" rules -- which allow and encourage operators to add new services to regulated tiers -- are not undone by exposing recently entered into business relationships to disruption.

Second, in the event the Commission decides against the adoption of the grandfathering proposal set forth above, it should consider the adoption of a bifurcated leased access fee structure under which any new rate formula would apply only to the lease of a vacant or "dark" channel. Where an existing programmer must be "bumped," the current "highest implicit fee" formula would remain in effect.[4]

---

[3]With respect to the use of newly added channels for leased access, the Commission should establish a phase-in schedule so that a reasonable amount of such capacity also is available for non-leased use.

[4]The Commission has indicated that, in calculating leased access channel rates under the existing formula, cable operators should (i) exclude must carry and PEG channels and (ii) calculate a separate rate for each tier. In many situations, application of these two requirements could produce an anomalous result whereby the leased rate for carriage on a cable system's basic service tier ("BST") is lower than the rate for carriage on the system's cable programming service tier ("CPST"). (For example, this may occur where a low-cost

(continued...)

Third, the Commission should specify that contractual provisions guaranteeing carriage remain enforceable. Thus, for example, where a cable network has negotiated an agreement providing for guaranteed carriage, it should be given the benefit of that bargain as against other non-leased programmers, including specific enforcement. The Commission suggests in the Notice that programmers and cable operators "assumed the risk" of bumping at the time they entered into carriage agreements. Notice at para. 99. Whatever the merits of that position, enforcing guaranteed carriage provisions at least recognizes that some operators and programmers insured themselves against that "risk," however remote it may have seemed at the time.

Fourth, regardless of the particular fee methodology adopted, the Commission should rethink its proposal to require cable operators to make public, in advance, a list of those channels that are subject to deletion. The creation of such a "hit list" of vulnerable programming services will further negatively impact the value of any services included thereon, diminishing investment and harming consumer welfare.

Fifth, the Commission should make clear that while cable operators may increase their subscriber rates by $0.20 per channel in accordance with the going forward rules when new leased access channels are added to a regulated CPST, such increases will not count

---

[4](...continued)
new service is added to the CPST and the only services carried on BST other than must carry or PEG channels are superstations.) Making BST leased access far less expensive than CPST leased access turns the normal operation of the marketplace -- in which BST carriage is more highly valued than CPST carriage -- on its head. ESPN submits that all channels, including PEG and must carry, should be considered in any implicit fee formula. At the very least, if the Commission insists on excluding such channels and requiring tier-by-tier calculations, the Commission should make clear that cable operators are allowed to designate which tier -- BST or CPST -- will be available for leased access use.

against the "Operator's Cap." Many cable operators have already reached the limits of the cap through the addition of new non-leased services. In such cases, application of the cap when leased access channels are added will force even those cable operators with available capacity to drop services previously added under the cap in order to ensure that they recover the operating costs associated with the leased channel's carriage. Furthermore, those operators who have not yet added non-leased services up to the level of the cap could find their incentive to add such services severely constrained if the carriage of leased channels causes them to reach the cap.

Sixth, the Commission should not establish special preferential leased access rates for not-for-profit programmers. Mandatory reduced leased access rates for not-for-profit programmers not only is inconsistent with the statutory directive that leased access not adversely affect the cable operator's economic position, it also is unnecessary. Not-for-profit status does not equate to financial hardship or a lack of sufficient resources to purchase leased access capacity on the same basis as for-profit enterprises. In addition, free PEG access already provides not-for-profit entities with a means of disseminating noncommercial programming over cable systems.

Finally, the Commission should consider allowing cable operators to establish an exclusive separate "leased access tier," the rates for which would be even lower than the rates charged for vacant BST or CPST channels. In adopting its "new product tier" ("NPT") rules, the Commission has recognized that separating untried services from established BST and CPST services can enhance subscriber choice and create incentives for new services to improve their attractiveness to subscribers. As is the case with NPTs, the leased access tier would be subject to a no buy-through requirement, thereby ensuring that it represents a "genuine outlet" for leased access programming.[5] Allowing operators the option of establishing an exclusive tier for leased channels would reduce the extent to which those channels "free ride" on the enormous investments made -- and being made -- by existing and emerging networks and ensure that leased access serves its intended statutory purpose: ensuring that real consumer demand for market viable programming is not frustrated by the cable operators.

CONCLUSION

ESPN believes that in order to remain faithful to the underlying objectives of Section 612, the Commission should not inadvertently create a subsidy for leased access programmers. By artificially limiting its consideration to those factors cited in the Notice, the Commission forbids any comprehensive assessment of the actual value of these channels. Ultimately, these channels will be denied to the ever-increasing number of diverse programmers who have and continue to invest significantly in their programming based on consumer demand.

For the reasons stated above, ESPN respectfully urges the Commission to retain its current leased access fee formula, at least as applied to channels currently occupied by non-leased programmers. Furthermore, we urge the Commission to consider additional

---

[5]The Notice misinterprets the legislative history of the 1992 Cable Act as requiring cable operators to position leased access programming on either the BST or the most highly penetrated CPST. Notice at paras. 119-20. What concerned Congress was the placement of leased access channels on inaccessible channel locations, not separately available tiers. Indeed, one of the prominent themes of the 1992 Cable Act is Congress' encouragement of increased subscriber choice through reductions in the bundling of programming. See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991).

modifications to the rules proposed in this proceeding so as to minimize the subsidy that will be accorded leased access programmers and to minimize disruption to subscriber expectations and to the competitive structure and partnership relationships that exist in this industry.

Respectfully submitted,

ESPN, Inc.

Edwin M. Durso /

Edwin M. Durso
David R. Pahl
Michael J. Pierce

ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454

Dated: May 15, 1996

39426